Supreme Court, U.S.
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No. 01-1200

IN THE
Supreme Court of the United States

SOUTHERN COMPANY, *et al.*,
Petitioners,

v.

RICHARD T. ALDERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

Respondents make no effort to show that the question of the permissible extent of general personal jurisdiction is unworthy of this Court's consideration. None of the respondents denies the importance of that issue. None of the respondents purports to identify a clear standard, operating in the lower courts, that governs assertions of general jurisdiction. Respondents Alderson et al. explicitly acknowledge that "there may be a conflict in the lower courts as to the precise scope of general jurisdiction" (Br. in Op. 26); respondent Danielson makes only a token effort to argue the contrary, ignoring most of the cases that are inconsistent with the decision below (Br. in Op. 24-25).

Instead, respondents focus their attention on this case alone. They make extensive factual claims and argue that the decision below is fact-bound and correct. They assert that we mischaracterize the holding of the court below when we say that the court allowed the exercise of general personal jurisdiction solely because the Hammond, Indiana power plant sold the bulk of its output to an Illinois firm.

All of these arguments are wrong. Our characterization of the ruling below was correct, and the case is not fact-bound. In addition—although the Court need not reach this issue—even if all of respondents' factual characterizations were true, the assertion of general jurisdiction in this case would still violate the Due Process Clause, and this case would still merit review by this Court.

1.a. The court below addressed the due process issue at Pet. App. 31a-35a. In that portion of its opinion, there are three passages that discuss the facts of this case. So that there can be no mistake about the basis of the court's ruling, we

will set forth these passages in their entirety. In the first passage, the court below said (*id.* at 32a):

> As we discussed in connection with the "doing business" analysis, [petitioners] have purposefully directed their activities toward Illinois residents, namely, Commonwealth Edison and its customers, and have reached out to create continuing relationships with those residents. Because these defendants have directed their activities toward the Illinois marketplace and have derived economic benefit as a result of those activities, the fact that the sale of electricity to Commonwealth Edison is technically carried out in Indiana is of no consequence.

In the second passage—explaining why its assertion of general jurisdiction, in particular, was consistent with the Due Process Clause—the court said (Pet. App. 33a):

> We conclude, however, that [petitioners] have maintained continuous and systematic business contacts with Illinois that support the assertion of general jurisdiction over them. We base our conclusion on many of the same factors supporting our conclusion that these defendants are "doing business" in Illinois. These defendants, through State Line Energy, agreed to commit the Power Plant's normal operating capacity to an Illinois utility exclusively for 15 years. Therefore, their contacts with Illinois cannot be characterized as random, fortuitous, or attenuated.

In the third passage, the court was interpreting the Due Process Clause of the Illinois Constitution, rather than the United States Constitution, but its analysis sheds light on how it approached the due process issues (Pet. App. 34a):

> Through their operation and management of the Power Plant, [petitioners] have engaged in economic activities which have a substantial effect upon interests located in Illinois. The record demonstrates that Commonwealth Edison and the Illinois residents it serves are dependent upon the electricity the Power Plant generates. In light of

these defendants' substantial connections with Illinois, it is "fair, just, and reasonable" to require them to defend these actions in Illinois.

The *only* basis for jurisdiction mentioned in any of these passages is the sale of the bulk of the Indiana plant's output to an Illinois firm. There is no trace of "a multi-factor, record-intensive analysis" (Alderson Br. in Op. 21). At no point in this part of the opinion—the only part that discusses the due process issue—did the court below mention *any* of the other facts that respondents recount in such detail. If, for example, the court attached significance to the fact that certain contracts concerning the Indiana plant were executed in Illinois, or that the Indiana plant received some limited services from Illinois, it would have been simple enough for the court to say that those facts were relevant to its conclusion.

Similarly, if the court below believed—as other courts have said, in general jurisdiction cases—that all the facts must be taken together and that "[t]here is no talismanic significance to any one contact or set of contacts that a defendant may have with a forum state" (*Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F. 3d 560, 570-71 (2d Cir. 1996), cert. denied, 519 U.S. 1006 (1996), 519 U.S. 1007 (1996)), then the court below could have said that, as well, in its discussion of the due process issue. Instead, the court's opinion on the due process issue attached decisive significance to one circumstance: the sale of the bulk of the output of the Indiana plant to an Illinois firm. The question we present in the petition is therefore squarely raised by this case.

b. Respondents dwell on the sentence, in the second passage quoted above, that states (Pet. App. 33a): "We base our conclusion on many of the same factors supporting our conclusion that these defendants are 'doing business' in Illinois." Respondents Alderson et al. repeatedly quote two words from this sentence, with an ellipsis, to support a claim that the

decision below relied on "many . . . factors" (Br. in Op. i, 1, 9, 21). But this sentence does not say that the court is using a multi-factor analysis. It says something closer to the opposite: that not all of the facts mentioned in the "doing business" portion of the opinion are relevant to the due process issue. The fact that respondents must resort repeatedly to the creative use of an ellipsis demonstrates that they are unable to find support in the opinion for their assertion that the court below rested its due process holding on a multi-factor analysis.

The court below identified the "factors" on which it "base[d its] conclusion" about the Due Process Clause: the duration of the agreement to sell power from the Indiana plant to Commonwealth Edison, and the supposed exclusivity of that agreement. The opinion did not use qualifying phrases such as "for example," "among other things," or "in the particular circumstances of this case." Instead, after referring to the sale of power to Commonwealth Edison—and nothing else—the court concluded: "Therefore, [petitioners'] contacts with Illinois cannot be characterized as random, fortuitous, or attenuated." Pet. App. 33a. We do not see how the opinion can be read other than to say that those sales from the Indiana plant were sufficient to satisfy due process.

Beyond that, in the portion of the opinion in which the court concluded that petitioners were "doing business" in Illinois (and therefore were within the state's general jurisdiction statute), the overwhelmingly dominant theme—as respondent Danielson candidly admits (Br. in Op. 2)—is that petitioners were "doing business" in Illinois because the bulk of the output of the Indiana plant was committed to Commonwealth Edison. See Pet. App. 21a-26a. The court returned to this fact over and over in responding to petitioners' arguments. See, *e.g.*, Pet. App. 21a, 23a, 25a, 26a. There is no "record-intensive analysis": the court mentioned only a few other facts, such as the Indiana plant's location on the state

line, and it referred to those facts only glancingly. The opinion provides no basis for saying that the court would have reached a different conclusion—even on the statutory "doing business" issue, which is distinct from the due process issue—if those other facts were not present.

c. Respondents also make much of the lengthy introductory passage in the opinion below, where the court recounted evidence from the record in detail. Pet. App. 3a-12a. Respondents vehemently assert that the court would not have mentioned these facts unless it meant to rely on all of them to support its conclusion about general jurisdiction. See Alderson Br. in Op. 6, 10 n.5; Danielson Br. in Op. 6-7.

But there is a straightforward explanation for the court's recitation of this evidence: in addition to upholding the exercise of general jurisdiction, the court below considered (and rejected) respondents' effort to assert specific jurisdiction over petitioners. See Pet. App. 17a-20a. The Illinois specific jurisdiction statute refers to precisely the kinds of contacts that the court detailed in the opening portion of its opinion: "[t]he transaction of any business within this State" (735 ILCS 5/2-209(a)(1)); "[t]he ownership, use, or possession of any real estate situated in this State" (735 ILCS 5/2-209(a)(3)); and "[t]he making or performance of any contract or promise substantially connected with this State" (735 ILCS 5/2-209(a)(7)). Having stated these facts at the outset of its opinion, the court then reviewed them in its discussion of the specific jurisdiction statute (see Pet. App. 17a-20a). The court made no mention at all of these facts when it addressed the due process issue—showing that these facts were irrelevant to its holding on that issue.[1]

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[1] Respondents Alderson et al. (Br. in Op. 8-9) place great emphasis on the statement, made by the court below in discussing earlier Illinois decisions, to the effect that "substantial revenues from sales in Illinois are not enough to satisfy the 'doing business' standard in cases not involving

2. Even if one were to accept respondents' characterization of the decision below, that decision is still incorrect, and this case is still an unusually good vehicle for this Court's review. Respondents seek to paint a confusing picture of factual complexity, but in reality this case presents a simple, and not unusual, situation: an out-of-state plant that (i) is located near the forum state and (ii) sells the bulk of its output to a forum state firm. The alleged contacts that respondents recount in such detail—the use of a public road in the forum state, the occasional services from the forum state, the negotiations between Commonwealth Edison and petitioners, the communication between the customer and the plant—are the kind of contacts one would be likely to find in any case with these two features.

Even accepting respondents' characterization of the Illinois court's holding, therefore, this case presents a vehicle for reviewing the general jurisdiction issue that is unusually free of factual complexity. As we showed in the petition, many other courts have addressed (and disagreed about) when a state may assert general jurisdiction on the basis of either sales in the forum state or location near a state boundary. See Pet. 16-22. Importantly, in this case, unlike many general jurisdiction cases, there is no complicating issue about specific jurisdiction, because of the lower court's ruling against respondents on that question. For all of these reasons, this case would be an exceptionally good vehicle for

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product defects." Pet. App. 22a. This statement, again, refers explicitly to the Illinois statutory standard, not to the Due Process Clause. Moreover, when the court below explained what *would* satisfy the "doing business" standard, it again emphasized not the facts that respondents dwell on, but rather the sales from the Indiana plant to Commonwealth Edison: the court said that in this case "there exists activity specifically directed toward the Illinois market" and "this is not a situation where State Line Energy plausibly can claim as fortuitous the fact that the electricity * * * ultimately is consumed in Illinois." Pet. App. 23a.

the Court's consideration of general jurisdiction even if respondents' account of the decision were correct.[2]

The decision below is also plainly wrong on the merits, again even taking all of respondents' factual assertions at face value. As this Court stated in *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 416 (1984), the question in a general jurisdiction case is whether the defendant's contacts with the forum "constitute the kind of continuous and systematic business contacts the Court found to exist in *Perkins* [*v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)]." There is simply no comparison between petitioners here and the defendant in *Perkins*. In *Perkins* the defendant's business was conducted from an office in the forum; petitioners do not have any plant or any office of any kind in Illinois, as the court below explicitly conceded (Pet. App. 23a). In *Perkins* the defendant's highest-ranking officer was located in the forum and was running the firm from there; petitioners do not have any employees or any agents of any description in Illinois. In *Perkins* the defendant extensively used financial institutions in the forum; none of the petitioners has so much as a bank account in Illinois.[3]

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[2] In a puzzling passage, respondents Alderson et al. assert there is "an alternative and independent ground for the decision below * * * not challenged in the petition" (Br. in Op. 27). So far as we can determine, respondents' argument is that the petition challenges only the Illinois court's holding under the Illinois "doing business" statute, 735 ILCS 5/2-209(b)(4), and not its holding that jurisdiction could also be asserted under a different statute, 735 ILCS 5/2-209(c).

In fact, of course, we challenge neither of those holdings in this Court, because both concern matters of state law. Our contention is that the decision of the Illinois court is inconsistent with the Due Process Clause of the Fourteenth Amendment; for purposes of that contention, it makes no difference which state statute the Illinois courts relied on.

[3] Oddly, respondents Alderson et al. emphasize the fact that Commonwealth Edison maintained equipment at the Indiana plant (Br. in Op. 13, 19). But the fact that Commonwealth Edison had to place its

3.a. In many respects, the arguments advanced by respondents unwittingly demonstrate why this Court should grant review. For example, respondents follow the tendency displayed by many courts to conflate specific and general jurisdiction; respondents repeatedly lose sight of the fact that this case concerns the latter. Thus respondents refer repeatedly to choice of law provisions in certain contracts entered by petitioners, and they assert—using language from specific jurisdiction cases—that petitioners "availed themselves of Illinois law" (Alderson Br. in Op. 15) and "purposefully invoked the protections and benefits of [Illinois] law" (Danielson Br. in Op. 15 n.11). Respondents are treating this case as if it involved an assertion of specific jurisdiction over a claim arising out of those contracts. Of course it does not: the court below held that petitioners may be subject to suits in Illinois "neither arising out of nor related to the defendant[s'] contacts" with Illinois (Pet. App. 33a). This Court's decisions have never suggested that once a firm enters a contract that contains an Illinois choice of law provision, it can be sued in Illinois on claims having nothing to do with that contract.

Indeed, under the holding of the court below, petitioner Southern Company could be sued in Illinois on a claim that arose anywhere in the nation, or for that matter anywhere in the world, and that had nothing remotely to do with Illinois—even though, as respondents Alderson et al. recognize, Southern Company is "engaged in the nationwide production of electricity" (Br. in Op. 2), and it does only an infinitesimal percentage of its business at the Indiana plant (see Pet. 13-14). None of the respondents makes any effort to defend this aspect of the Illinois court's holding. More tellingly, how-

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equipment in Indiana, to take title to the electricity there, shows the *absence* of a contact with Illinois. Similarly, respondents try to make much of the fact that Commonwealth Edison maintained a telephone connection to the Indiana plant; but the fact that the plant's Illinois customer had to telephone into Indiana again demonstrates the extent to which operations were centered in Indiana, not Illinois.

ever, respondents, like the court below, do not even appear to appreciate how extraordinary a result this is—a sign of how endemic the confusion between specific and general jurisdiction has become, and of how much this Court's guidance is needed.

b. Similarly, respondents assert that it would be pointless for the Court to review this case because the Due Process Clause standard for personal jurisdiction inevitably requires an assessment of all the facts and precludes generalization. See Alderson Br. in Op. 23; Danielson Br. in Op. 10-11. In support of that claim, respondents cite (*ibid.*) passages from this Court's opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). But in the six decades since *International Shoe*, the law governing specific jurisdiction has become much more well-defined, thanks to this Court's many specific jurisdiction decisions. See Pet. 3 (citing cases).

Those decisions demonstrate that the Due Process Clause inquiry in personal jurisdiction cases need not be wholly open-ended, as respondents assert. What is needed is guidance from this Court on the permissible scope of general jurisdiction, comparable to that which it has provided about specific jurisdiction. Indeed, as we said in the petition, because specific jurisdiction is so expansive, general jurisdiction can be quite precisely tailored—for example, to the traditional bases of a corporation's home state and principal place of business (as some lower courts have held, and as the classic academic treatment of personal jurisdiction urges), or to the functional equivalent of those traditional bases. See Pet. 23-24 (citing authorities).

c. Finally, the intensely factual nature of the Briefs in Opposition is itself, indirectly, further evidence of the need for review by this Court. The respondents emphasize that there is a 1500 page record in this case on the jurisdictional issue alone. Alderson Br. in Op. 1, 10; Danielson Br. in Op. 1. Such protracted litigation that does not even address

the merits is a sign of a dysfunctional jurisdictional regime; but it is the unavoidable consequence of the approach that many state and lower federal courts take to general jurisdiction. Any contact between the defendant and the forum—no matter how unrelated to the claim—is fair game; all such contacts can be added together, in just the way respondents attempt, to try to exceed some vaguely-specified level. This Court's intervention is needed to provide a more coherent and rational approach to this recurring and important issue.[4]

CONCLUSION

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] As we explained in the amici curiae brief we filed in No. 01-929, *DaimlerChrysler Aktiengesellschaft v. Olson*, as well as in the petition in this case, we believe that this case provides an exceptionally good vehicle for the Court to consider the due process limits on general jurisdiction. We agree with petitioners in No. 01-929 and in No. 01-1290, *McInnis v. Daniel*, however, that those cases would provide the Court an additional perspective on this issue and on related issues of specific jurisdiction, and we agree with petitioners in those cases that the Court may well consider it appropriate to grant plenary review in all of these cases and consider them together.